

NATURAL RESOURCES COMMISSION**Information Bulletin #13****Second Amendment****January 1, 2006**

SUBJECT: Mediation and Facilitation in Administrative Proceedings before the Natural Resources Commission and the Department of Natural Resources

I. Introduction to Alternative Dispute Resolution

The use of “alternative dispute resolution” (or “ADR”) as a methodology to resolve disputes without resort to litigation has enjoyed increasing acceptance and application in recent years by the civil courts. There are several forms of ADR, with two of the most familiar being (binding) arbitration and (non-binding) mediation.

With the success of alternative dispute resolution at the civil level, there has been a growing interest in its application at the administrative level. Both federal and state agencies are looking to mechanisms to streamline government, and ADR provides an important opportunity for doing so.

One limitation to alternative dispute resolution at the state administrative level is that there are regulatory structures that cannot be negotiated, nor typically can the authority to enforce regulatory requirements be delegated by the state agency to a third person. This limitation is perhaps most notable for, but not exclusive to, instances where a state agency has primary enforcement authority (or “primacy”) for a federal program. The state agency must regularly demonstrate to its federal counterpart the ability to enforce a regulatory program in a manner that is at least as effective as at the federal level.

As a consequence, the form of alternative dispute resolution most-frequently implemented by state agencies is mediation. The mediator helps bring litigants or potential litigants together. Communications among the parties and the mediator are privileged as settlement negotiations. The mediator can urge a compromise, can help point out weaknesses in a party’s position or strengths in the opposing party’s position, and can assist in bringing a sense of realism to a dispute. The mediator has no authority, however, to require a negotiated settlement or to order or prohibit an enforcement action. The parties retain all of their legal rights and privileges throughout a mediation session.

II. Development of Mediation Before the Commission

Although several state agencies have used informal dispute resolution, sometimes calling the process “mediation”, the natural resources commission was a pioneer in the use of a mediation process similar to what is sanctioned for civil court proceedings. An early effort was developed and codified at 310 IAC 23-7 (repealed) to help resolve disputes between timber buyers and landowners. This mediation rule was authorized by statute and patterned closely after the rules for civil mediation. 310 IAC 23-7 was used successfully on several occasions for timber buyer cases pending before the NRC’s division of hearings and was, with the consent of the parties, also used in two administrative cases involving the Indiana Surface Mining and Reclamation Act.

The Indiana general assembly in 1995 created the administrative orders and procedures act (or “AOPA”) study committee. One of the charges of the AOPA study committee was to “study... [w]hether alternative dispute resolution would be effective to streamline and simplify administrative adjudication.” If the AOPA study committee determined ADR would be effective, a related charge was “how best to implement alternative dispute resolution” in the context of state administrative law.

With this backdrop, the governmental/regulatory agencies committee of the alternative dispute resolution section, Indiana state bar association, met in September 1995. The governmental/regulatory agencies committee agreed to discuss the use of mediation by the natural resources commission pursuant to the timber buyer law, the opportunity for mediation within the voluntary remediation program administered by the Indiana department of environmental management, and the possibility that the AOPA study committee would propose legislation with respect to one or more forms of alternative dispute resolution. A consensus was achieved with respect to three key points:

1. Mediation, with its dependence upon achieving an agreement by all parties in the final settlement, is the most conservative form of alternative dispute resolution and the form which should currently be pursued in state administrative law.
2. The mediator should enjoy technical expertise relative to the agency’s programs and their application to the Indiana administrative orders and procedures act.
3. A statutory structure should be developed which would be cognizant of the worth of mediation and the need to preserve the integrity of the negotiation process, including the protection of confidential statements by the parties.

The governmental/regulatory agencies committee also recommended a simple amendment proposed to IC 4-21.5 to acknowledge and authorize the use of mediation by state agencies. The recommendations of the governmental/regulatory agency committee were subsequently forwarded to the AOPA study committee.

Subsequently, the Indiana state bar association as a whole also adopted a general resolution for submission to the AOPA study committee. The resolution provided:

Resolved, that the Indiana State Bar Association urges Indiana administrative agencies to promote and utilize alternative dispute resolution. Further we encourage the Indiana General Assembly to take appropriate action to enable Indiana administrative agencies to effectively use alternative dispute resolution.

Resolved, that the Indiana State Bar Association commends the Administrative Orders and Procedures Act Commission for their efforts; and encourages the Commission to continue to study the administrative adjudication process in order to assure that the citizens of Indiana obtain a timely, fair and just hearing.

Be it resolved, and adopted by the Indiana State Bar Association Board of Governors this second day of December, 1995.

The AOPA study committee considered the use of alternative dispute resolution by state agencies in its 1995 summer session and proposed a legislative response. Although a much more ambitious undertaking than anticipated by the governmental/regulatory agencies committee bill draft, the AOPA study committee settled upon the use of mediation as the form of ADR to be implemented, and its legislative proposal was otherwise harmonious with that draft. The AOPA study committee proposal was ultimately embodied in Senate Bill 241, and the bill passed with only modest amendments from the version suggested by AOPA study committee.

Senate Bill 241 added a new chapter to the AOPA as P.L. 16-1996. The legislation became effective July 1, 1996 and required action by the “ultimate authority” for the agency to determine the appropriate application of mediation to the agency. The Natural Resources Commission is the “ultimate authority” for the department of natural resources pursuant to IC 14-10-2-3.

Effective August 1, 1996, the natural resources commission approved a nonrule policy document to implement P.L. 16-1996 and to set guidelines for its implementation. The nonrule policy document superseded 310 IAC 23-7, and IC 4-21.5-3.5 and the guidelines form the current foundation for mediation before this agency and the department of natural resources. The guidelines were described in 1996 as a “pilot project” likely to require refinement for mediation to achieve its full potential for dispute resolution and streamlining. Reference was also made to the potential for using facilitation. The commission also directed that the experience with mediation be presented for its subsequent review. See “Pilot Project for the Use of Mediation and Facilitation for Dispute Resolution Before the Natural Resources Commission and Before the Department of Natural Resources”, Information Bulletin #13, 19 Ind. Reg. 3227 (August 1, 1996).

With the assistance of the Indiana Conflict Resolution Institute of Indiana University, five state agencies entered a memorandum of understanding in 1999 to cooperate in the implementation of mediation at the administrative level. These were the Indiana department of environmental management, the office of environmental adjudication, the state emergency management agency, the department of natural resources, and the natural resources commission. This memorandum was structured to terminate in 2000, although the participants subsequently continued to act under its guidance. This voluntary, cooperative effort has come to be known as the “Shared Neutrals Program”.

A new document entitled the “2005 Memorandum of Understanding Concerning the Interagency Shared Neutrals Program for Mediation” has been prepared. The new memorandum also anticipates a voluntary, cooperative effort among state agencies but has an extended duration. The department of natural resources and the natural resources commission are authorized to join in the 2005 memorandum effective January 1, 2006.

III. Implementation of Administrative Mediation

1. Application: This document is intended to implement IC 4-21.5-3.5 for the use of mediation before the Natural Resources Commission and the Department of Natural Resources. The document should be construed liberally to achieve governmental streamlining and to help achieve consensus in the administrative functions of the agencies.

2. Application of Mediation and Facilitation to Proceedings of the Natural Resources Commission: Mediation is made available for the following matters under the jurisdiction of the commission:

- (1) proceedings in which the natural resources commission, or an administrative law judge for the commission, is the “ultimate authority” pursuant AOPA (including accelerated mediation for disputes relative to temporary structures in public freshwater lakes under 312 IAC 11-3-2);
- (2) where a hearing officer has been appointed for the commission regarding the creation, management, or dissolution of a conservancy district pursuant to IC 14-33;
- (3) a special commission hearing held pursuant to IC 14-11-1-3; and,
- (4) the mediation of disputes arising between the users of surface water pursuant to IC 14-25-1-8.

The parties may agree upon a mediator. To assist the parties in the selection of a mediator, the administrative law judge or hearing officer may identify a panel from the participants in the Shared Neutrals Program. If the parties do not agree upon a mediator, the administrative law judge or hearing officer may appoint a mediator from among the participants in the Shared Neutrals Program. The administrative law judge or hearing officer also has discretion to appoint a facilitator for any proceeding, except one governed by AOPA, where determined appropriate to assist in achieving a settlement or developing consensus on an issue that might make a settlement more likely. Unless the parties otherwise agree, a mediator shall serve without cost to them. A mediator selected under this paragraph shall be qualified under IC 4-21.5-3.5.

3. Application of Mediation and Facilitation to Proceedings of the Department of Natural Resources: Mediation is made available for the following matters under the jurisdiction of the department of natural resources:

1. a public hearing prior to a licensing action pursuant to IC 14-11-4-8 (including licenses under the flood control act, lakes preservation law, wild animal possession law, and other laws designated in that statute by the legislature);
2. where a conservancy district matter is pending before the department;

3. prior to a decision by the historic preservation review board on the addition or removal of a site from the register of Indiana historic sites and structures pursuant to IC 14-21-1-17; and,
4. for hearings held on petitions for rule change.

The parties may agree upon a mediator. To assist the parties in the selection of a mediator, the director or a deputy director may identify a panel from the participants in the Shared Neutrals Program. If the parties do not agree upon a mediator, the director or a deputy director may appoint a mediator from among the participants in the Shared Neutrals Program. The director or a deputy director also has discretion to appoint a facilitator to assist with the resolution of any dispute described in this paragraph. Unless otherwise the parties otherwise agree, a mediator shall serve without cost to them. A mediator selected under this paragraph shall be qualified under IC 4-21.5-3.5.

4. Voluntary Pool of Agency Mediators and Further Development of Mediation: Efforts should be explored by the commission's division of hearings and the department's office of legal counsel to determine the feasibility of establishing a voluntary pool of mediators outside state government. In these efforts, open communications should be maintained or developed with other state agencies, local or regional government, the Indiana state judiciary, and the Indiana state bar association.

5. Approval by the Natural Resources Commission and Publication: The first amended information bulletin was approved as by the natural resources commission as a nonrule policy document during its April 1999 meeting. The document was published in the Indiana Register at 22 IR 2949 (June 1, 1999). This amended information bulletin was approved by the commission during its November 2005 meeting and published in the Indiana Register on January 1, 2006.
